East Bay Newspapers, Inc., d/b/a Contra Costa Times *and* Northern California Newspaper Organizing Committee (AFL-CIO; IBT). Case 32-CA-3709

August 19, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On May 3, 1982, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, East Bay Newspapers, Inc., d/b/a Contra Costa Times, Walnut Creek, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Threatening employees with losses of wage increases or other benefits because they engage in union or other activities protected by the Act, from creating the impression that such protected activities are under surveillance by management, and from coercively interrogating employees about their own or other employees' protected activities.

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT threaten employees with losses of benefits or with other acts of retaliation because they engage in activities protected by the Act.

WE WILL NOT interrogate employees about their own or other employees' protected activities.

WE WILL NOT spy on or create the impression that we are spying on employees' activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

EAST BAY NEWSPAPERS, INC., D/B/A
CONTRA COSTA TIMES

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: On August 31, 1981,[1] the Regional Director for Region 32

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Chairman Van de Water does not endorse the holding in *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981), and subscribes to the standard announced in *Essex International, Inc.*, 211 NLRB 749 (1974). See *Intermedics, Inc., and Sugitronics Corporation, a wholly owned subsidiary of Intermedics, Inc.*, 262 NLRB 1407 (1982).

[3] The recommended Order has been modified by including the narrow injunctive language traditionally used by the Board.

[1] All dates are in 1981 unless otherwise specified.

of the National Labor Relations Board (herein the Board) issued a complaint and notice of hearing pursuant to timely charges against East Bay Newspapers, Inc., d/b/a Contra Costa Times (herein Respondent). The complaint alleges in substance that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein the Act), by certain statements made on or about June 11 and 12 by its city editor, Nancy Ward, to certain reporters working under her supervision, and, independently, by maintaining an unlawful no-solicitation rule.

Respondent duly answered, admitting facts and conclusions warranting the exercise of the Board's jurisdiction and that Nancy Ward was its supervisory agent,[2] but denying all substantive allegations of wrongdoing.

I heard the matter at Oakland, California, on March 22, 1982, and received timely briefs from the General Counsel and Respondent thereafter. Upon the entire record, I make these:

FINDINGS OF FACT

Respondent publishes newspapers in the greater San Francisco Bay area, incuding the Contra Costa Times (herein Times).[3] The Times offices are in a building in Walnut Creek, California, which also houses the business offices and publishing plant for most of Respondent's newspapers.

While Respondent's printing trades people are represented, the Times' editorial staff is nonunion. On or about June 12, following some initial contacts with Respondent's reporters by agents of admitted labor organizations, an umbrella group (the Charging Party herein) known as Northern California Organizing Committee (herein NCOC) began a public organizing drive directed at editorial employees through leafletting and handbilling by agents of admitted labor organizations at the Walnut Creek main offices.[4]

Two reporter-employees of the Times claim that Ward, their immediate supervisor, interrogated or otherwise coerced employees in their Section 7 rights by statements she made to them shortly before and during the initial June 12 leafletting campaign. Ward denied that she made the statements, and what she vaguely admitted to saying on the subject of the organizing drive is legally innocuous. These aspects of the case therefore turn purely on witness credibility, which I resolve against Ward, based on the following considerations: The two employees who testified in support of the Government's case, Erin Hallissy and Kathleen Maclay, were sincere in appearance and convincing in their recollections. Ward was neither impressive from the standpoint of demeanor nor was her testimony illuminating due to her vagueness and tendency to fall back on general characterizations regarding what she said to those employees. Ultimately, she admitted that, when she first became aware of "rumors" of a union organizing drive and that one of the Times' reporters had been contacted by a union agent, she was "asked to," and did, make inquiries among the employees about what was going on. I am satisfied on this record that Ward was engaged in similar activities during the period with which we are concerned, and that it would have been in character for her to have inquired and made the statements attributed to her by the General Counsel's witnesses.

A. *June 11 Wage Increase Remarks*

Hallissy credibly stated that Ward told a small group of reporters on June 11 that as far as she knew certain earlier promised wage increases had been recommended and approved but that higher management officials, Tom Jones and Jack Winning, were "upset" about the rumors of union organizing and that, unless the "union talk" stopped, the raises would not come.

Maclay, although identified by Hallissy as being nearby at the time, did not directly corroborate Hallissy. Rather, referring perhaps to a separate incident on June 11, Maclay credibly stated that Ward concluded a telephone conversation and then stated to persons in her general area that the "raises are definitely in the works" and that employees should "cool it" about the "union talk" until the raises were actually issued.[5]

I do not find the discrepancies between Hallissy's and Maclay's versions to be significant from a credibility standpoint, or to outweigh the credibility considerations set forth above. Ward elsewhere admitted that she had "several conversations during the day with reporters about pay increases." It is possible that Hallissy and Maclay heard entirely different sets of remarks by Ward that day. In each version, moreover, the central message was the same; i.e., that the expected pay raises would come through unless the employees were to upset the applecart by engaging in "union talk."

B. *June 12 Interrogation of Maclay*

Maclay credibly stated that in the late afternoon of June 12 Ward initiated a conversation in which Ward said that she was aware that Maclay had received a telephone call from another reporter relating to the organizing drive.[6] Ward then asked Maclay to tell her who had called her. Maclay refused. Ward then asked Maclay at least to tell her who on the "union committee" had asked the caller to call Maclay. Maclay again refused, saying that "to reveal anyone's identity would be improper." Ward concluded the conversation by saying: "Well, then if your name is on anybody's union list, you'll have to let the chips fall where they may."

---

[2] Respondent's answer, as amended at the hearing. Hereafter, all references to complaint and answer include hearing amendments thereto.

[3] In the year before the complaint issued, Respondent received gross revenues exceeding $200,000, subscribed to national news syndicates, and advertised products sold nationally.

[4] I need not decide herein whether NCOC is, itself, a labor organization within the meaning of Sec. 2(5) of the Act. Respondent admits that the constituent unions which work under the NCOC label are themselves statutory labor organizations. As will be seen herein, the statements complained of by Nancy Ward merely referred to certain "union" activities of employees.

[5] Raises were not ultimately withheld.

[6] The night before a reporter had called Maclay saying the someone else on the "union committee" had referred the caller to Maclay to inquire about "possible union support" among the reporters at the Times. Maclay had told another reporter about this before being approached by Ward.

C. *"No-Solicitation" Rule*

As the parties stipulated, at all times material before September 2, 1981, Respondent maintained this written rule in all its operations:

SOLICITATION PROHIBITED

Based upon long established rules, your attention is called to the following:

Solicitation of any type by employees during working time is prohibited.

Distribution of literature of any type or description by employees during working time is prohibited.

Distribution of literature of any type or description in working areas is prohibited.

"Violation of any of the above rules will result in immediate disciplinary action, including discharge.

Under the Board's 1974 decision in *Essex*,[7] this "working time" (as opposed to "working hours") prohibition on solicitation and distribution was presumptively lawful in that it carried no suggestion that employees would be prohibited from using their lunch or breaktime to engage in protected activities.

On July 31, 1981, however, a new Board majority decided *T.R.W.*;[8] and, in "rejection of the principle espoused in *Essex*," concluded that there was no "inherent meaningful distinction between the terms 'working hours' and 'working time' when used in no-solicitation rules." Thus, overruling the contrary holding in *Essex*, the Board held that (at 443):

> . . . rules prohibiting employees from engaging in solicitation during "work time" or "working time," *without further clarification*, are, like rules prohibiting such activity during "working hours," presumptively invalid. [*Id.*, emphasis supplied.]

Reacting to this development, on August 31, 1981, Respondent posted this notice to employees:

Date August 31, 1981

To: ALL EMPLOYEES

Re: No-Solicitation Rule

We have recently been notified by our attorneys that the National Labor Relations Board has ruled that employers must include language in their no-solicitation policy advising employees that the prohibition of solicitation on working time does not apply to break periods, meal periods or other specified periods during the work day when employees are properly not engaged in performing their work tasks.

As you know, our no-solicitation rule has never applied to break periods and meal times or other specified periods during the work day when you are properly not engaged in performing your work tasks. If you have any questions regarding this please contact me.

/s/ Gail Davidson
Personnel Director
GD/aa

Moreover, as the parties stipulated, on September 2, 1981, Respondent posted this notice to employees on the subject:

September 2, 1981

NO SOLICITATION RULE

Your attention is called to the following rules:

"Solicitation of any type by employees during working time is prohibited.

"Distribution of literature of any type or description by employees during working time is prohibited.

"Distribution of literature of any type or description in working areas is prohibited.

"Violation of any of the above rules will result in immediate disciplinary action, including discharge."

This rule does not apply during break periods and meal times or other specified periods during the work day when employees are properly not engaged in performing their work tasks.

/s/ Gail Davidson
Personnel Director

There is no evidence nor contention by the General Counsel that either the "old" or "new" rule was ever unlawfully enforced.

Analysis and Conclusions

Ward's statements to employees on June 1, as found above, that "union talk" would jeopardize the implementation of already decided upon wage increases necessarily tended to interfere with, restrain, or coerce employees in their rights under Section 7 of the Act to discuss among themselves the possibility and desirability of union representation.[9]

Similarly, Ward's unsolicited and persistent interrogations of Maclay on June 12 in an effort to gain intelligence about the organizing activity then going on, occurring on the day after she had made coercive statements about wage increases, necessarily had an unlawful coercive impact. Finally, in the same context, Ward's remark to Maclay that, if Maclay were on the "union's list," the "chips would fall where they may" would read-

[7] *Essex International, Inc.*, 211 NLRB 749 (1974) (Members Fanning and Jenkins dissenting).

[8] *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981).

[9] There is not the slightest suggestion in this record that Ward's comments were directed at "union talk" during "work time," nor, for that matter, that there was any prohibition against employees talking—as opposed to "soliciting"—about any subject they wished to while at work. Rather, it is clear on this record that Ward's admonitions were intended to suggest that the possibility of union representation was itself threatening to Respondent's top management and that employees should curb *any* activity which might suggest to those top managers that there was interest in union representation, lest the pay raises be canceled.

ily be taken by Maclay as a veiled threat of management retribution, thus violating Section 8(a)(1) of the Act. Moreover, Ward's statement to Maclay that Ward had become aware (without saying how) of a union-related telephone call which Maclay had been involved in on the preceding evening created the impression that management was engaged in surveillance of employees' union activities, thus aggravating the coercive character of her interrogation and veiled threat.

As to the allegation that Respondent violated Section 8(a)(1) by maintaining the pre-September 2 "no-solicitation" rule, I conclude that the violation was technically committed, but that it has been substantially remedied. Respondent cannot be charged with malicious intent for the mere maintenance of a rule which, under controlling law at the time, was "presumptively valid." *Essex, supra.* In this regard, I note further that Respondent commendably took steps within 31 days after the Board published its decision in *T.R.W.* to clarify its existing rule so as to notify employees of their rights to solicit and distribute during times when they were properly not engaged in work.[10] I conclude, therefore, that it would effectuate no important purpose of the Act to prescribe a separate remedy for the maintenance of the "old" rule—especially in the absence of evidence that the "old rule" was ever, in fact, enforced as to "off-work" solicitation or distribution.[11]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. On June 11, 1981, Respondent, through its agent and supervisor, Nancy Ward, interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act by telling them in substance that their wage increases would be in jeopardy if they were to persist in "union talk," and thereby violated Section 8(a)(1) of the Act.

3. On June 12, 1981, Respondent, through Nancy Ward, similarly violated Section 8(a)(1) of the Act by creating the impression that Respondent was surveilling employees' protected activities, by interrogating an employee about her own and other employees' protected activities, and by making a veiled threat to an employee that management would retaliate against employees who were associated with protected organizing activities then under way.

4. Respondent technically violated Section 8(a)(1) of the Act as more recently interpreted by maintaining until September 2, 1981, a "no-solicitation" rule which failed to specify that employees were free to engage in protected solicitation during times when they were not supposed to be working. But, considering that Respondent's pre-September 2 rule was consonant with the then-prevailing law, and that Respondent promptly and suitably clarified that rule when the law shifted, no remedy is required for said violation.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[12]

The Respondent, East Bay Newspapers, Inc., d/b/a Contra Costa Times, Walnut Creek, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from threatening employees with losses of wage increases or other benefits because they engage in union or other activities protected by the Act, from creating the impression that such protected activities are under surveillance by management, from coercively interrogating employees about their own or other employees' protected activities, and from any like or related unlawful activities.

2. Take the following affirmative action deemed necessary to effectuate the purposes and policies of the Act:

(a) Post at its Walnut Creek, California, facilities the attached notice marked "Appendix"[13] immediately after receiving copies of the same from the Regional Director for Region 32 and after it has been signed by a responsible agent of Respondent, and maintain it thereafter in conspicuous places, including in all places where notices to employees are customarily posted, for 60 consecutive days. Reasonable steps shall be taken by Respondent to ensure that copies of said notice are not altered, defaced, or covered by other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

---

[10] Given delays between the time of issuance of Board decisions and the time when they are actually publicized by reporting services, it takes an alert and conscientious practitioner to become aware of a significant shift in the law and then to effect changes in client practices—all within a roughly 1-month period.

[11] Here, it is well to recall language in *Cities Service Oil Company*, 158 NLRB 1204 (1966), where the Board stated (*Id.* at 1207):

> In devising all our affirmative orders . . . we bear in mind that the remedy should be appropriate to the particular situation requiring redress, and should be tempered by practical considerations.

See, e.g., *American Federation of Musicians, Local 76, AFL-CIO (Jimmy Wakely Show)*, 202 NLRB 620, 622 (1973).

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."